Southwestern Bell Mobile Systems

June 27, 1994

Via Hand Delivery

Karen B. Peck
Attorney

Mr. William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Stop Code 1170
Washington, D.C. 20554

RE: GN Docket No. 94-33; In the Matter of Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers

Dear Mr. Caton:

Enclosed for filing in the above referenced proceeding are the original and nine copies of the Comments of Southwestern Bell Mobile Systems, Inc. Please file these Comments among the papers in this proceeding.

Please file-mark and return the extra copy of the Comments to our courier.

Thank you for your assistance.

Very truly yours,

Karen Peck
Karen B. Peck

Enclosure

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	§	
	§	GN Docket No. 94-33
	§	
Further Forbearance from	§	
Title II Regulation for	§	
Certain Types of Commercial	§	
Mobile Radio Service Providers	§	

COMMENTS OF SOUTHWESTERN BELL MOBILE SYSTEMS, INC. ON NOTICE OF PROPOSED RULEMAKING

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ATTORNEYS FOR SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

Dated: June 27, 1994

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SUMMARY

Southwestern Bell Mobile Systems, Inc. urges the Commission not to distinguish among providers of commercial mobile radio service (CMRS). The Commission's Notice of Proposed Rulemaking ("NPRM") contemplates treating various providers of CMRS differently, based upon the "size" of the provider. Such generic treatment would preclude a true public interest inquiry into the basis for forbearance and would be completely contrary to Congress' goal of implementing regulatory symmetry. Adoption of rules that discriminate among CMRS providers, favoring some at the expense of others, would distort the CMRS market, would create a confusing regulatory framework, would be impractical to oversee, and would impede vigorous and free competition.

As to certain sections of Title II at issue in the NPRM, the Commission should undertake forbearance as follows:

* The Commission should continue to refrain from imposing the obligations in Sections 213, 215, 218, 219, and 220 upon CMRS providers and should not exempt a subclass of CMRS providers from potential application of these provisions.

* Every CMRS provider should provide access to Telecommunications Relay Services.

* The Commission should forbear from applying the Telephone Operator Consumer Services Improvement Act to CMRS providers.

* The Commission should forbear from imposing Telephone Disclosure and Dispute Resolution Act requirements upon CMRS providers, in particular the local exchange carrier obligation to permit subscribers to block access to pay-per-call services.

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COMMENTS OF SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

To the Federal Communications Commission:

Southwestern Bell Mobile Systems, Inc. ("SBMS") submits these comments in response to the Commission's NPRM in the above-referenced proceeding.[1]

I. Introduction

As a matter of policy and in order to follow Congressional intent, the Commission should not create subclasses of providers of Commercial Mobile Radio Service ("CMRS") and discriminate among those subclasses for purposes of enforcing Title II of the Communications Act ("Title II"). The Commission's goals -- to minimize the

[1] SBMS is an indirect wholly-owned subsidiary of Southwestern Bell Corporation ("SBC"), a publicly traded corporation. Through its various ownership interests, SBMS is the second largest cellular carrier in the United States in terms of customers served. It has been a leader in the development and implementation of advanced telecommunications technologies. SBMS is either licensee or general partner of the licensee in more than 55 markets.

costs of regulatory compliance and to foster competition -- are admirable, but attempting to achieve those goals by imposing regulatory disparities is off the mark. There is no basis, especially so soon after the issuance of the Second Report and Order,[2] for the Commission to dismantle the regulatory parity it attempted to put into place. Furthermore, it would be impossible for the Commission to fulfill its obligation to consider and protect the public interest if it were to provide generic exemption from Title II on the basis of the "size" of certain providers.

The Commission posed numerous questions concerning forbearance from certain sections of Title II. SBMS addresses the following:

A) The Commission should continue to refrain from imposing the obligations in Sections 213, 215, 218, 219, and 220 upon CMRS providers and should not exempt a subclass of CMRS providers from potential application of these provisions.

B) Every CMRS provider should provide access to Telecommunications Relay Services.

C) The Commission should forbear from applying the Telephone Operator Consumer Services Improvement Act to CMRS providers.

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[2] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, Gen. Docket No. 93-252, FCC 94-31 (Released March 7, 1994) ("Second Report and Order").

D) The Commission should forbear from imposing Telephone Disclosure and Dispute Resolution Act requirements upon CMRS, and in particular the local exchange carrier obligation to permit subscribers to block access to pay-per-call services.

Review of these sections of Title II makes plain that a determination of how the public interest would be affected by forbearance cannot be considered on a generic basis. Rather, each section of Title II must be considered individually. This is particularly true given that a primary goal of Congress in enacting the Omnibus Budget and Reconciliation Act of 1993[3] and of the Second Report and Order was to create a system of regulatory symmetry, and by so doing to foster competition in the rapidly expanding wireless market. For the Commission, only three months after issuing the Second Report and Order establishing regulatory symmetry, to contemplate imposing a system of subclasses and regulatory favoritism would be to revert to the old imbalanced system without even giving regulatory parity a chance. Such action would certainly fly in the face of the goals of Congress in enacting the Omnibus Budget Reconciliation Act. The Commission should allow its system of regulatory symmetry at least to take effect and show its

[3] Codified at 47 U.S.C. §§ 303(n), 332.

worth before deciding whether division of CMRS providers into subclasses warrants consideration.

In addition, as discussed in more detail below, the Commission's proposed two-part test for considering the public interest (the third prong of the forbearance standard in 47 U.S.C. § 332) is inadequate. The Commission's test assumes that the public interest is to be measured solely by costs of compliance and comparisons among CMRS providers and overlooks most of what Title II was designed to protect. Further, it wrongly presupposes that it is proper to forbear among classes of CMRS providers, rather than asking in the first instance whether such discrimination could be warranted.

II. Further Forbearance from Title II Regulation is Warranted in Certain Circumstances.

The Commission has asked interested parties to address the Title II provisions remaining for possible forbearance after the Commission's Second Report and Order. As discussed below, varying upon the nature of the Title II provision and the statutory test set forth in section 332(c)(1)(A), the Commission should forbear from applying certain sections. Such action by the Commission, however, should be applied uniformly across the class of CMRS providers; there is no basis for recreating the regulatory disparities that existed prior to the

Omnibus Budget Reconciliation Act by creating subclasses of CMRS providers, only some of whom would be granted preferential regulatory treatment and incentives. SBMS discusses certain of the Title II provisions below.

A) The Commission should continue to refrain from imposing the obligations in Sections 213, 215, 218, 219, and 220 upon CMRS providers and should not exempt a subclass of CMRS providers from potential application of these provisions.

In the Second Report and Order, the Commission rightly determined that it is unnecessary to exercise its authority under Sections 213, 215, 218, 219, and 220 of Title II. Such inaction continues to be appropriate.

In GN Docket No. 93-252, SBMS and its parent corporation, Southwestern Bell Corporation, agreed with the Commission's tentative conclusion that it should "forbear from adopting or enforcing regulations" pursuant to Sections 213, 215, 218, 219, and 220. SBMS continues to believe that forbearance is appropriate, given that these provisions are tailored for regulation of monopoly telephone companies rather than the competitive wireless market. If formal forbearance is not to occur, at this time it remains appropriate for the Commission to continue to refrain from adopting regulations and affirmative obligations pursuant to these sections.

It would be entirely inappropriate, however, for the Commission to decide to forbear from applying these sections of Title II to certain CMRS providers and not to others. There is no logical basis for determining on a class-wide basis that oversight by the Commission is needed only for certain CMRS providers.

The Commission has expressed concern that increased regulation might have an "adverse economic impact on certain types of providers that is not in the public interest." NPRM at 7. This question is misplaced. It overlooks entirely the purpose of these sections and does not properly apply the public interest test of Section 332. For example, a carrier's "size" (measured by net worth or otherwise) has no bearing whatsoever on whether review of its management under Section 218 would be appropriate. Likewise, should the Commission ever determine that it were appropriate to inquire into a carrier's management under Section 218, the cost of the inquiry to the carrier would have little bearing on whether the public interest were served by the review.

SBMS would expect that the Commission would only find it necessary to act under these provisions if practices by a carrier or class of carriers were appearing to threaten the public interest in a way that the market could not address. Such is not the case for any class of CMRS at this time. If in the future the Commission

were to determine that a carrier's practices threatened the public interest in a manner warranting review, the "size" of the offending carrier or the cost to the carrier of the review would not under any public interest standard allow the Commission to turn its head if review were otherwise warranted. As indicated previously, nothing supports any Commission application of these provisions at this point, but neither does anything support the potential of oversight for certain carriers rather than others based solely on the "size" of the carriers in question.

B) Every CMRS provider should provide access to Telecommunications Relay Services.

Title IV of the Americans with Disabilities Act ("ADA") obligates all common carriers providing interstate or intrastate wire or radio communications to provide telecommunications services that enable persons with hearing and speech disabilities to communicate with individuals without those disabilities. In Title IV, Congress specifically stated its intent that "[i]n order to carry out the purposes established under section 151 of this title, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, *the Commission shall*

ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States." 47 U.S.C. § 225(b)(1)(emphasis added).

The Commission has inquired whether there are "CMRS providers whose market is so specialized, or their customer base or size of operation so small that applying TRS obligations to them would not appreciably advance the universal service objectives of Section 225?" This inquiry is not appropriate for determining whether telecommunications relay service ("TRS") should be forborne for some or all CMRS providers. "Not appreciably advancing universal service" is not part of the standard prescribed by Congress for determining when TRS may be forborne. Instead, Congress' goal was that all hearing and speech impaired Americans have access to telecommunications services.

In order to forebear from applying this section to CMRS, much less to a selected subset of CMRS, the Commission would have to find that the standards in Section 332(c)(1)(A) of the Communications Act allow forbearance. Quite plainly, they do not. First, it is not true that the obligation to offer TRS need not be enforced in order to ensure that carriers' practices are not unjustly or unreasonably discriminatory (see §

332(c)(1)(A)(i)). Rather, failure to enforce this section would allow discrimination against hearing and speech impaired individuals.

Nor can the second prong of Congress' test be met, for it cannot be said that "enforcement of such provision is not necessary for the protection of consumers." 47 U.S.C. § 332(c)(1)(A)(ii). To the contrary, uniform enforcement of Section 225 is necessary to protect the interests of hearing and speech impaired consumers.

Finally, the third prong -- enforcement is not necessary for protection of the public interest -- likewise cannot be met. The Commission identified two potential "public interest" factors: differential costs of compliance and fewer public interest benefits for certain providers.[4] Even if some providers have fewer customers than others, the customers of those providers would be served by having TRS available, and the public as a whole would be served by universal availability of TRS. Moreover, it need not be "burdensome" for "small" carriers to comply, as TRS is available, for example, under contract from third parties at relatively nominal costs. Further, Congress made plain its desire in Section 225

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[4] NPRM at 4. As indicated previously, in and of themselves, these provisions are insufficient to address fully the public interest because they do not consider the purpose of the statute under consideration for forbearance.

that the Commission *ensure* the availability of TRS "to the extent possible and in the most efficient manner." 47 U.S.C. § 225(b)(1). Accordingly, there is no basis for the Commission to determine that forbearance is appropriate for any class of CMRS providers covered by Section 225.

C) The Commission should forbear from applying the Telephone Operator Consumer Services Improvement Act to CMRS providers.

In this proceeding, the Commission should take a step it declined in the Second Report and Order and forbear from applying the Telephone Operator Consumer Services Improvement Act, 37 U.S.C. § 226 ("TOCSIA") to CMRS providers. Based upon the record before the Commission in that proceeding,[5] as well as the record that will certainly be gathered in this proceeding, forbearance for all CMRS providers is appropriate and necessary.

The Commission may forbear from applying TOCSIA if the three-part Congressional test of Section 332 is met.

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[5] See Comments in GN Docket No. 93-252 of GTE at 18-19; In-Flight Phone Corp. at 5-6; McCaw at 11, n. 31; Motorola at 19; TRW at 32; Waterway Communications System at 10-12; see also Reply Comments of GTE at 9; Telephone and Data Systems at 6-7.

All three elements of the test support Commission forbearance for CMRS providers.[6]

First, application of TOCSIA is not necessary to assure just, reasonable, and nondiscriminatory rates. See 47 U.S.C. § 332(c)(1)(A)(i). No evidence was presented to the Commission in GN Docket No. 93-252 that CMRS providers have undertaken the types of abusive practices cited by Congress in enacting TOCSIA, nor was there any evidence that concern about unreasonable or discriminatory rates is in any way warranted.[7] To the contrary, competition among CMRS providers serves to stimulate lower rates and consumer benefits, not unreasonable and discriminatory rates.

Second, application of TOCSIA to CMRS is not "necessary for the protection of consumers." 47 U.S.C. § 332(c)(1)(A)(ii). No party to GN Docket No. 93-252 suggested, and the Commission has cited no evidence, that

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[6] The Commission has asked whether forbearance for particular classes of CMRS providers is warranted. As indicated previously, SBMS takes the position that the Commission should not adopt wholesale distinctions among CMRS providers, especially in light of the steps toward regulatory parity just taken by the Commission. Certainly, if the Commission insists on taking a narrow view of classifying CMRS providers, SBMS' argument in this section applies to cellular carriers such as itself, but like arguments would apply to other CMRS providers.

[7] Moreover, CMRS providers are already subject to the nondiscrimination obligations of 47 U.S.C. § 202.

users of CMRS have been subjected to the types of abusive practices covered by TOCSIA. No allegations of overcharges for assisted calls, "splashing," or blocking of access to interexchange carriers were cited in the record before the Commission in GN Docket No. 93-252. The Commission has offered no examples of cellular customer complaints to it regarding such practices by cellular carriers.

Furthermore, as noted by commanders in GN Docket No. 93-252, applying TOCSIA requirements to CMRS would be expensive and technically difficult. In fact, mobile public phone services had been provided for several years prior to the Commission's decision in the TOCSIA Declaratory Ruling[8] with no evidence of adverse impact upon consumers, despite the absence of TOCSIA regulation. Moreover, SBMS agrees with GTE's comments in its Petition for Reconsideration or Clarification in GN Docket No. 93-252 that the results of applying TOCSIA would do little if anything to further the public interest. As noted by GTE, under the Commission's TOCSIA Declaratory Ruling, all CMRS providers automatically and unwillingly would be considered to be operator service

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[8] Declaratory Ruling In the Matter of Petition for a Declaratory Ruling that GTE Airfone, GTE Railfone, and GTE Mobilnet Are Not Subject to the Telephone Operator Consumer Services Improvement Act of 1990, File No. MSD-92-14, Adopted August 18, 1993, 8 FCC Rcd 6171 (1993).

providers ("OSPs") by virtue of connecting to the interstate public switched telephone network and permitting indirect service users to pay with a credit card. GTE's Petition at 4. This would occur even if the CMRS provider were unaffiliated with any providers of mobile public phone services because, for example, the underlying carrier would unwittingly become an OSP any time that a rental car equipped with a mobile phone in use travelled into its service area. This would place the underlying cellular carrier in an impossible situation. First, the underlying carrier would have no knowledge of the rates being charged to the customer by the provider of the phone. The underlying cellular carrier would only know its agreed-upon (effectively "wholesale") roaming rate with the carrier of the provider of the phone. The rate charged to the customer by the provider of the phone could be entirely different -- the provider of the phone could absorb part of the cost, pass the cost through, or mark up the cost. Indeed, to be obligated to ask the provider of the phone the rates that it was charging could create serious problems of appearance from an antitrust standpoint. Moreover, even if it were proper to do so, the underlying carrier is unlikely to be able to determine whom to ask, for it has no way of knowing which roamers in its market are roaming on rental mobile phones. These problems are considerable.

Further burdens would be caused by the expense and effort of acquiring and/or configuring switches and software to brand roamer calls. An automatic roamer greeting feature is not available for all cellular switches, creating additional difficulties for carriers.

Not only would the branding and other obligations be burdensome, they would generate customer confusion. For example, a cellular subscriber taking a multi-state driving vacation or work-related trip would be likely to receive branding messages from a tremendous number of cellular carriers as the trip progressed. Moreover, because the underlying carrier's rates could be different from and/or incorporated in the rates charged by the provider of the phone, any rate information provided by the underlying carrier would be confusing to the customer. Current network capabilities would not allow branding to be limited to roamer calls made by mobile public phone users, because service providers are unable to distinguish among categories of roamers. Id.

In addition, application of TOCSIA and its concomitant tariffing obligations is entirely inconsistent with the Commission's decision to forbear from tariffing requirements in the Second Report and Order. The Commission rightly concluded that a tariff requirement could adversely impact flexibility and responsiveness, eliminate incentives for price discounting and new service

offerings, exact substantial administrative costs, and generally be uncompetitive. These conclusions likewise apply to a tariff obligation for TOCSIA.

Finally, under the third prong of the Section 332 test, it is consistent with the public interest for the Commission to forbear from applying TOCSIA to CMRS.[9] As indicated above, there is no evidence before the Commission that CMRS consumers are confronted with the types of problems that led Congress to enact TOCSIA. Moreover, it is plain from the record in GN Docket No. 93-252 that enforcement of TOCSIA upon CMRS will impose excessive burdens upon the industry, thereby increasing consumer costs and confusion. In the Second Report and Order, at 9, para. 17, the Commission stated that "we consider it appropriate to seek to avoid the imposition of unwarranted costs or other burdens upon carriers because consumers and the national economy ultimately benefit from such a course." In no way would competition

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[9] In an answer to the first prong of the Commission's proposed public interest test, see NPRM at 4, the costs and requirements of compliance would be burdensome for all types of CMRS providers; there is no need to distinguish among them. With regard to the Commission's second prong, it is plain that any public interest benefits to be gained from application of TOCSIA are few given the lack of evidence of any problems. Certainly the burdens of compliance outweigh any such benefits.

and the public interest be strengthened by the imposition of the TOCSIA requirements upon all or some CMRS providers.

D) The Commission should forbear from imposing Telephone Disclosure and Dispute Resolution Act requirements upon CMRS, and in particular the local exchange carrier obligation to permit subscribers to block access to pay-per-call services.

In the Second Report and Order, the Commission concluded that enforcement of the Telephone Disclosure and Dispute Resolution Act ("TDDRA") upon CMRS providers would not impose any unreasonable burdens. As the Commission noted, most of the TDDRA's requirements fall on interexchange carriers. However, the TDDRA's obligations on local exchange carriers would impose an undue and unwarranted burden on CMRS providers.

Under the TDDRA, local exchange carriers are obligated to permit subscribers to block access where technically feasible. The evident purpose of this obligation is to allow heads of household to prevent other members of their households, such as children, from accessing pay-per-call services, thereby incurring huge bills and/or exposing the children to services or subject matters to which the heads of household object. For cellular users, such concern is unwarranted because the cellular phone owner may lock the phone when it is

not in use, thereby preventing any access to the phone, whether to pay-per-call services or otherwise. SBMS is aware of no complaints by cellular phone users regarding unwanted access to pay-per-call services.[10] Rather than imposing additional regulatory and technical burdens upon carriers to block calls, the goals of the TDDRA can be met through simple subscriber action -- locking the phone -- which imposes no costs on carriers or subscribers. Similar approaches would be advisable for other forms of CMRS as well. For example, paging services, because they seek a returned call, should not fall within the purview of the TDDRA.

Given that blocking is unnecessary, any tariffing obligations related to such blocking likewise should be forborne.[11] Such tariffing obligations would contradict the Commission's decision in the Second Report and Order that competition among CMRS providers is sufficient to justify forbearance from tariff-filing obligations. Second Report and Order at 70, para. 181.

Forbearance from these requirements meets the three part test of Section 332. Given that the goals of the TDDRA can be accomplished other than by blocking, enforcement of Section 228 is unnecessary to ensure just,

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[10] At this time, SBMS does not carry "900" or "976" pay-per-call services or calls.

[11] See NPRM at 15, n. 69.

reasonable, and nondiscriminatory rates; it is unnecessary to protect consumers; and, given that the same degree of consumer protection can be achieved without the costs of regulation, it is in the public interest not to enforce the TDDRA, or at least its local exchange carrier call-blocking and tariffing obligations.

III. Distinction Among Providers of Commercial Mobile Radio Service Will Undermine Regulatory Parity and the Regulatory Scheme Established in the Second Report and Order.

As the above discussion demonstrates, in each instance for which the Commission considers forbearance it must perform the three part test set forth by Congress in Section 332. This necessarily includes a thorough consideration of the public interest at stake. The Commission could not comply with its statutory obligation to consider the public interest if it were to make broad generalizations about classes of carriers that should be exempt from Title II, particularly if such generalizations were to be based on the size of the carrier, which generally has no bearing on the carrier's performance and relations with the public.

Furthermore, to adopt wholesale exemptions for classes of CMRS based on arbitrary factors such as net worth, income, or percentage of interconnected traffic would seriously undermine the regulatory parity recently

implemented by the Commission. The Commission's February 3, 1994 News Release touted the Second Report and Order as changing "significantly the way in which mobile services are regulated by replacing a patch-work approach with a systematic approach that creates symmetry in the way providers of similar mobile communications services are regulated." News Release at 1. The Commission should not revert to a patch-work approach. Moreover, adopting wholesale exemptions on the basis of size, whether based on net worth, revenues, percentage of traffic, or other factors would create a wholly unmanageable regulatory framework requiring constant oversight and adjustment. The CMRS market is rapidly evolving and expanding, and a carrier that is relatively small (however measured) today could grow tremendously within a matter of months or years, whether by mergers or outstanding marketing practices and business management.

Finally, the former private mobile carriers now treated as CMRS providers have, by statute, a three year transition period. This three year grace period ameliorates any burden they might face in adjusting to treatment as a CMRS provider and removes any need to grant them preferential status in order to adapt to their new classification.

Given the above, SBMS' response to the Commission's inquiry whether the public interest might be served by forbearing from imposing various statutory obligations upon some providers of CMRS but not upon others is a resounding "No." Only by treating CMRS providers alike may the Congressional intent of regulatory symmetry be achieved.

Congress replaced "traditional regulation of mobile services with an approach that brings all mobile service providers under a comprehensive, consistent regulatory framework and gives the Commission flexibility to establish appropriate levels of regulation for mobile radio services providers." Second Report and Order at 7, para. 12. As acknowledged by the Commission, Congress had two goals in making the statutory changes: achieving regulatory symmetry and assuring an appropriate level of regulation, recognizing that conventional methods of regulation may be unnecessary to promote competition and protect consumers. Id. at 8.

The Commission sought to forge a balance between these goals in the Second Report and Order. It should not now offer favorable regulatory treatment to certain subclasses of CMRS providers, for to do so would disrupt the balance of Congressional goals and return to the regulatory disparity that Congress sought to correct.